

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 05Dec2001

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In the Matter of

PAULINE M. EWALD
Complainant

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WASTE
MANAGEMENT
Respondent
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: Case No. 1989-SDW-0001
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Before: Stuart A. Levin
Administrative Law Judge

For Complainant: Richard Condit, Esq.

For Commonwealth: John Butcher, Esq.
Senior Assistant Attorney General

DECISION AND ORDER

This matter arises pursuant to a complaint filed in 1989 by Pauline Ewald, the former Manager of Virginia's Superfund Remedial Program, administered by the Commonwealth's Department of Waste Management (DWM). Ewald alleged that she was fired and blacklisted in violation of the environmental whistleblower provisions of the Comprehensive Environmental Response, Compensation, and Liability Conservation and Recovery Act, 42 U.S.C. § 9610 (1988), (CERCLA);

the Resource Conservation and Recovery Act, 42 U.S.C. § 60971 (1988), (RCRA); the Clean Water Act, 33 U.S.C. § 1367 (1988)(CWA); and the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i), (1988)(SDWA), allegedly for voicing both internal and external complaints about the Commonwealth's implementation of various aspects of its federally funded superfund program. Specifically, Ewald believes she was the target of retaliation for engaging in protected activity when she complained to EPA about alleged mismanagement of the superfund program including improper staff and office space charges to the superfund grant, grant misappropriation, site-related and personnel problems. On November 21, 2000, the Commonwealth of Virginia filed a Motion to Dismiss asserting its sovereign immunity and seeking dismissal on the ground that this proceeding is barred by the Eleventh Amendment.

Because the constitutional issue was newly invoked despite protracted litigation spanning more than a decade, Ewald sought and received a brief extension of time to respond. On January 18, 2001, she filed a partial response to the Commonwealth's motion, moved for limited discovery, and sought to amend her complaint to add several individuals as party-respondents. The Commonwealth opposed her requests on January 29, 2001.

To fully explore the important issues presented, a pre-trial hearing on the Commonwealth's pending Eleventh Amendment motion was scheduled on January 31, 2001, and convened on March 20, 2001. At the hearing, Ewald contended that the Virginia General Assembly created the Virginia Superfund Program, including staff positions with delegated authority sufficient to secure federal CERCLA grant funds to implement it. Ewald thus asserted that her position as Manager of Virginia's Superfund Program was itself created by the General Assembly with sufficient authority to negotiate, prepare, submit, and implement cooperative agreements with the federal EPA which funded Virginia's program. In response to the Motion to Dismiss, Ewald thus argued that the Commonwealth waived its sovereign immunity to secure federal funds and limited discovery would permit her to demonstrate that Virginia's motion lacked merit.

Based upon the contentions presented in the Commonwealth's motion, Ewald's response, the arguments of counsel at the hearing, and considering the Court's comprehensive analysis of the Eleventh Amendment in South Carolina Ports Authority v. Federal Maritime Commission, __ F.3d __ (4th Cir. 2001), I

adopted a discovery procedure modeled upon the procedure implemented by the Court in State of Florida v. U.S. Case No. 4:00cv445-RH (Order, December 13, 2000), involving a similar sovereign immunity issue. Ewald was, accordingly, granted an opportunity to conduct limited discovery to determine whether the Commonwealth waived its sovereign immunity under the Eleventh Amendment when it participated in the CERCLA superfund program. Additional motions and responses were subsequently filed by the parties and addressed in the Order issued June 21, 2001, leading ultimately to the Supplemental Brief filed by Ewald on July 24, 2001, and a Further Brief filed by the Commonwealth on August 1, 2001.

Procedural History

Before turning to the merits of the Commonwealth's assertion of sovereign immunity in this proceeding, a brief review of its lengthy procedural history seems warranted. Ewald filed her complaint requesting a hearing on January 18, 1989, and nine days later, a notice issued scheduling the hearing in accordance with applicable regulations. The parties thereafter sought a continuance of the hearing while they engaged in extensive discovery which they pursued for the remainder of 1989 and most of 1990. On September 7, 1990, a pre-hearing status report was requested, and filed, and the parties pursued further discovery through June of 1991.

Proceeding simultaneously with this administrative matter, Ewald had filed, and was litigating in U.S. District Court, a complaint alleging that the Commonwealth, in terminating her employment, violated her constitutional rights of free speech and association. Following extensive discovery in that proceeding, the District Court, on April 22, 1991, granted the Commonwealth's motion for Summary Judgment and dismissed the complaint. Ewald v. Commonwealth, No. 3:9CV00494(E.D. Va., April 22, 1991), *Aff.d.* 972 F2d 339(4th Cir. 1992), *cert denied*, 113 S.Ct. 1386(1993). Shortly thereafter, the Commonwealth, on August 25, 1991, filed a Motion for Summary Decision seeking the dismissal of this matter on the ground that Ewald was collaterally estopped from litigating her whistleblower claim as a consequence of the final decision rendered by the District Court. Ewald cross-moved for Summary Decision on September 10, 1991, and responded to the Commonwealth's motion on November 16, 1991.

While the administrative matter was pending, the Fourth Circuit Court of Appeals, on July 22, 1992, affirmed the ruling of the District Court dismissing Ewald's complaint, and, in view of the Court's ruling, this matter was dismissed as

collaterally estopped on October 19, 1992. Complainant immediately filed an administrative appeal.

The Secretary decided the appeal on April 20, 1995, concluding that it was improper to dismiss the complaint on grounds of collateral estoppel because a higher burden was imposed upon Complainant in her District Court case than she would be required to satisfy under the environmental statutes.¹ Accordingly, the Secretary issued an order remanding the matter for further proceedings.

Before proceedings could be initiated on remand, however, the Commonwealth, by letter dated June 20, 1995, filed with the Office of Administrative Appeals (OAA), the appellate predecessor of the Administrative Review Board, a Motion for Summary Judgment. Ewald responded by asking OAA to strike the Commonwealth's motion as improperly filed with the OAA, and Commonwealth filed with OAA its Opposition to Ewald's Motion to Strike under cover letter dated July 26, 1995.²

¹ In the Order which issued on October 19, 1992, the trier of fact took into consideration the different burdens of proof and noted that the District Court's findings of fact satisfied both standards: "I have taken into consideration the fact that the Fourth Circuit in *Huang v. Board of Governors of University of North Carolina*, 932 F.2d 1134 (4th Cir. 1990), places a burden upon the employee to show that but for the protected expression, the employer would not have taken the alleged retaliatory action. Under the *Mt. Healthy* framework, the burden rests with the employer to demonstrate that it would have taken the same action even if the employee had not engaged in the protected activity. The District Court in this matter, however, found not only that Ewald failed to carry her burden of proof, it also considered the Employer's reasons supporting the action which it took. Thus, the Court affirmatively found that the protected activity was not the cause for the discharge. Indeed, the Court concluded that there was no material dispute in this regard. In these respects, the Court's decision, while citing *Huang*, nevertheless weighed *Mt. Healthy*-type justifications proffered by the Employer." at Order Granting Summary Decision at pgs. 5-6.

² At the time, it was not improper for a party to file a matter directly with OAA. OAA, in its discretion, reserved the authority to review a matter before it was considered by an ALJ or indeed while it was pending before the trier of fact. The direct filing of the Motion for Summary Decision with OAA by the Commonwealth was therefore not inherently inconsistent with OAA's assertion of jurisdiction in matters pending before Administrative Law Judges. See, Pogue v. Department of the Navy, 87 ERA 21 (October 24, 1994).

While the Commonwealth's motion was pending before the OAA, a departmental reorganization abolished OAA and replaced it with the Administrative Review Board.³ It appears, however, that neither the Motion for Summary Decision filed with the OAA by Commonwealth or the adjudicative record complied up to that point survived the appellate transition from OAA to the ARB. (*See*, Status Hearing July 26, 2000, Tr. pg. 7-8, 52-53). Consequently, for the next five years, no appellate action was taken to resolve the pending motion. In early 2000, the Office of Administrative Law Judges initiated informal inquiries regarding the status of the case both with the parties and the ARB, and, thereafter, a status hearing convened on July 26, 2000, followed by further inquiries to the ARB. (Hearing, July 26, 2000, Tr. 46-49, Tr. 58; Tr. 70, 83-84; *See*, Letter dated July 27, 2000 from ALJ to Chairman of ARB). After reconstructing the motions record, the Board responded.⁴ On August 21, 2000, the Board, agreeing with Ewald's 1995 Motion to Strike, concluded that the Commonwealth's Motion for Summary Judgment was improperly filed, and, accordingly, it remanded the matter for further proceedings.

Proceedings on Remand

On remand, during the course of Ewald's discovery in preparation for her response to the Commonwealth's Motion for Summary Decision, the Commonwealth interposed its sovereign immunity defense and moved, on November 16, 2000, to dismiss these proceedings. In view of the Eleventh Amendment issues raised by its defense, all other matters were held in abeyance

³ The Administrative Review Board replaced the Office of Administrative Appeals on May 3, 1996. 61 FR 19986(1996).

⁴ The administrative record of all prior filings transmitted to OAA, was apparently misplaced by OAA, and was not returned when the matter was remanded by the Administrative Review Board on August 22, 2000. The parties were advised at the status hearing I convened on July 26, 2000 that the record was lost on appeal. Hearing July 26, 2000, Transcript pgs. 4-7, 16, 70-76; *See also*, Order dated November 1, 2000. All of the history set forth above was, therefore, gleaned from a review of the docket sheet maintained by Office of Administrative Law Judges, and prior decisions issued by the courts, the trier of fact in this matter, or the Secretary.

pending resolution of this matter.⁵ Ewald responded and filed several motions, leading to hearing which convened on March 20, 2001. Because the Eleventh Amendment was newly raised by the Commonwealth and not the subject of previous discovery, Ewald was afforded an opportunity to conduct an inquiry limited to the issue of waiver of sovereign immunity. Discovery is now complete, and the parties have filed supplemental briefs; Complainant on July 24, 2001, Respondent on August 1, 2001.

The Motion to Dismiss was taken under advisement based the arguments of the parties, the record of the March 20, 2001, hearing, and all materials addressing the sovereign immunity waiver issue filed and served by Complainant.⁶

Nature of Proceedings

1.

Article I v. Article III Adjudication

Before addressing the issue of waiver which Ewald presents as the focal issue in this matter, I should comment briefly on the nature of the proceedings. The Commonwealth of Virginia is not alone in its efforts to interpose the Eleventh Amendment as a bar to private actions filed by state employees seeking the protection of the environmental whistleblower laws. Rhode Island, Ohio, Florida,

⁵ In its Motion to Dismiss, the Commonwealth collaterally asserted in a footnote that its Motion for Summary Judgment, filed with OAA, had, at the time, been pending for 1975 days, and that the “Secretary’s failure to promptly decide the matter constitutes an egregious violation...” of the rules and requires dismissal. (Motion to Dismiss, Fn. 20 at pg.4). The record shows that the matter was pending before the appellate tribunal approximately 1885 days, from June 20, 1995 to August 21, 2000, yet, during that entire time, neither the Commonwealth nor Complainant ever inquired about its status let alone initiate any action to compel a decision. (Hearing, July 26, 2000, Tr.47-48.). Under such circumstances, absent a showing of actual prejudice, any sanction sought by the Commonwealth seems unwarranted. *See, Passaic Valley Sewage Com’rs v. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993) at 477, fn. 7. Moreover, efforts to move matters with bit more alacrity, upon remand, were not entirely welcomed by the Commonwealth even as it continued to seek dismissal due to delay. (*See*, Va. Bill of Objection filed November 21, 2000, and Order issued November 29, 2000, fn.1; *See also*, Va. Opposition Filed January 2001, at fn. 20.).

⁶The Commonwealth submitted no additional evidence with its supplemental brief.

and, most recently, Connecticut have successfully pursued Eleventh Amendment collateral actions in federal district courts; and each obtained injunctive relief barring the administrative adjudication of the whistleblower's private cause of action.

Each of the district courts rejected a contention advanced by the Department of Labor that the Eleventh Amendment does not apply to federal agency adjudicatory proceedings, and the Department appealed in two of the cases; Florida in the Eleventh Circuit and Rhode Island in the First Circuit. In the Department's considered judgment, the district court rulings reflect a fundamental misunderstanding of Eleventh Amendment principles of immunity because they fail to distinguish between judicial proceedings which are covered by the Eleventh Amendment and Article I administrative proceedings which, the Department contends, are not subject to the Eleventh Amendment bar. (*See, e.g., Rhode Island v. U.S.*, Appeal Pending, No. 01-1543, First Circuit, Br. for Appellant at 11-12; Florida v. U.S., Appeal Pending, No. 01-12380-HH, Eleventh Circuit, Br. for Appellant at 11.

While it appears the question the Department litigates is a matter of first impression in the First and Eleventh Circuits, this proceeding arises within the jurisdiction of the Fourth Circuit, a Court which has considered the perceived distinctions between judicial and administrative proceedings, and has declined to accept the notion that the Eleventh Amendment does not apply to the latter.⁷ In South Carolina State Ports Authority v. Federal Maritime Commission, __ F.3d __ (4th Cir. March 12, 2001), the Court held not only that "Article I tribunals may exercise the judicial power of the United States," (South Carolina State Ports Slip at 7) but that administrative processes and proceedings of a type virtually identical to those applicable here constitute adjudicative proceeding in which "judicial acts" are performed, (South Carolina State Ports Slip at 8-10), and the Eleventh Amendment

⁷Complaints involving alleged violations of Section 9610(a) are filed with Department of Labor, Occupational Safety and Health Administration (OSHA) which investigates the matter and renders a decision on the merits. A party dissatisfied with OSHA's determination may then request a formal hearing before an Administrative Law Judge. (Section 9610(b), 29 CFR Part 24). For other alleged violations, Section 9659(a)(1), entitled "Citizen Suits" provides that any person may commence a civil action against "...the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution..."

applies. (South Carolina State Ports Slip at 10).⁸ *See also*, Ohio, *supra* at 13; Florida, *supra*, at 6; Connecticut, *supra*, at 19; Rhode Island, *supra* at 4-5. Although the Department disagrees with South Carolina State Ports, (*See*, Rhode Island v. U.S., Appeal Pending, No. 01-1543, First Circuit, Br. for Appellant at pg. 17-18, fn. 6; Florida v. U.S., Appeal Pending, No. 01-12380-HH, Eleventh Circuit, Br. for Appellant at pg. 16-17, fn.5), this is a case arising within Fourth Circuit's bailiwick, and the Court's rationale seems equally applicable to private actions seeking redress against a state under the environmental statutes. Thus the distinction between Article I and Article III adjudication would not seem sufficient to abridge the Commonwealth's Eleventh Amendment claim in proceedings governed by South Carolina State Ports.

2.

Constitutional Questions

It has also been suggested that constitutional issues, generally, and sovereign immunity issues in particular, should not be addressed in the context of an administrative proceeding, and I am mindful of those arguments. The Administrative Law Judge in Jayco v. Ohio, for example, concluded that he lacked authority to consider the sovereign immunity issue, (*See, e.g.* ALJ D&O at 61), and the District Court seemed to agree even while concluding that the two-week administrative trial which resulted was unconstitutional. (*See, Ohio, supra* at 12,18). Yet, the constitutionality of CERCLA is not in issue in these proceedings.

It is, of course, a well established principle of administrative jurisprudence that non-Article III judicial officers must avoid adjudicating the constitutionality of federal statutes or certain constitutional claims, (*See, Ohio, supra* at 12, citing Commodity Futures Trading Commission v. Schor, 478 U.S.833 (1986)) (Commission jurisdiction to adjudicate common law counterclaim), but I am unaware of any authority which precludes an ALJ from applying constitutional

⁸Although the courts which have considered the question disagree in respect to whether the investigations conducted by OSHA are barred by the Eleventh Amendment, (*Compare, Ohio, supra*, at 19-20; Rhode Island, supra, Slip op.at 8; and Florida, supra, at Slip Op. at 7, ("Congress clearly acted within its constitutional authority in...authorizing the Department of Labor to investigate violations, even by the states."), *with Connecticut, supra*, at Slip Op. at 20-21), the courts all concur that sovereign immunity applies upon transmittal of the complaint for adjudication by an ALJ.

principles in an administrative proceeding, (*See, OFCCP v. The Boeing Co.*, 1999 OFC 14 (ALJ, Aug. 16, 1999)), during the trial, or when rendering a final decision. *See, Nationsbank v. Herman*, 174 F.3d 424 (4th Cir. 1999), *dec. on remand*, *OFCCP v. Nationsbank*, 1997 OFC 16, ALJ Aug. 25, 2000. Indeed, in circumstances virtually indistinguishable from this matter, the Fourth Circuit in *South Carolina State Ports*, specifically noting that the ALJ had “dismissed the suit on sovereign immunity grounds,” reversed the Federal Maritime Commission which had reversed the Administrative Law Judge. *South Carolina State Ports*, *supra* at 3.

In this instance, Ewald acknowledges that CERCLA is a commerce power enactment, (*See, Hearing, March 20, 2001, Tr. 16.*)⁹ and agrees that it can not abrogate a state’s sovereign immunity. Precedent supports her concession. Although the Supreme Court has yet to review a state’s sovereign immunity defense in the context of CERCLA’s whistleblower provisions, it has twice reviewed CERCLA’s limited and specific abrogation of sovereign immunity in Section 107, and ultimately found it inconsistent with the Eleventh Amendment. (*Pennsylvania v. Union Gas Co.*, 491 U.S. 3 (1989), *overruled*, *Seminole Tribes of Florida v. Florida*, 517 U.S. 44, 72-73,(1996); *see, fn. 11 infra*). Clearly, then, CERCLA would not abrogate the sovereign immunity of an unwilling state, but Complainant argues forcefully that Eleventh Amendment jurisprudence would not preclude a waiver of sovereign immunity in the context of a commerce power statute under circumstances in which Congress conditioned a grant of federal funds upon the sovereign recipients agreement to submit to private suits. She believes such a waiver accompanied Virginia’s participation in the Superfund Program, and she

⁹Complainant does not extract from the legislative history of the whistleblower provisions of CERCLA any evidence that Congress identified a pattern of discrimination by the states against those who complained about hazardous waste or other environmental risks sufficient to trigger the protections of Section 5 of the Fourteenth Amendment. While the whistleblower protection provisions of CERCLA may have, in part, been motivated by general concerns expressed by legislators that workers who provided information about environmental hazards potentially risked adverse action by their employers, (*See, Hearing March 20, 2001, Tr. 17, 12-21*), Complainant has adduced no legislative history indicative of a pattern of discrimination by the states. *Florida Prepaid* 527 U.S. 119 S.Ct. 2207; *City of Bourne v. Flores*, 117 S.Ct. 2157; *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000).

was afforded a full opportunity to pursue discovery and research which might substantiate her argument.¹⁰

Consequently, while Constitutional principles apply to the questions raised in this proceeding, the validity of the whistleblower provisions of the Act is not in question.¹¹ The issues are whether CERCLA embodies a clear legislative intent to condition the grant of federal funds on a waiver of sovereign immunity, and whether the state, seeking to secure the federal funds, unequivocally acquiesced in the waiver. The authorities suggest that it would not constitute an unwarranted administrative intrusion to consider the sovereign immunity waiver issues under such circumstances. To the contrary, consideration of the issue may be unavoidable in the context of the Fourth Circuit's decision in South Carolina State Ports and ARB jurisprudence which casts the sovereign immunity issue as "jurisdictional in nature." (Pastor v. Veterans Affairs Medical Center, 99 ERA 11 (ARB Ord. March 1, 2001)).

Sovereign Immunity

South Carolina State Ports Authority provides instructive guidance in another respect. Before upholding the State's assertion of sovereign immunity, the Court, based upon the Supreme Court decisions in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Aldin v. Maine, 527 U.S. 706 (1999), observed that

¹⁰While Complainant primarily alleges violations of CERCLA, (Hearing March 20, 2001, Tr. 16), her complaint also alleges violations of the RCRA, 42 U.S.C. § 60971 (1988); the CWA, 33 U.S.C. § 1367 (1988); and the SDWA, 42 U.S.C. § 300j-9(i), (1988). Complainant has adduced no legislative history indicative of pattern of discrimination by the states against employees with respect to subject matter of these enactments.

¹¹ The Commonwealth challenges congressional power to require a waiver of sovereign immunity under CERCLA, assuming the Act were construed to include one with respect to its whistleblower protections. CERCLA, it argues, emanates from the congressional exercise of commerce power, not Section 5 of the Fourteenth Amendment, and Congressional exercise of commerce power is insufficient to vitiate a state's sovereign immunity. The Commonwealth is correct, (Seminole Tribes, *Supra*), but the argument strays wide of its target. Congressional power to abrogate the sovereign immunity of a non-consenting state is not in issue here. Complainant's theory here is predicated on the notion that the Commonwealth consented to a waiver, and as shall be addressed more fully hereinafter, the High Court has ruled that Congress may exercise its commerce power to condition the grant of federal funds on a waiver of sovereign immunity and states may accept such gratuities subject to their waiver.

sovereign immunity is not absolute but may be subject to six exceptions:

First, sovereign immunity does not bar a suit where the state has given consent. Second, states remain subject to suits brought by the Federal Government or by other states. Third, Congress retains the right to abrogate the sovereign immunity of the states pursuant to the Fourteenth Amendment's Section 5 enforcement power. Fourth, sovereign immunity does not bar private suits against municipal corporations or other lesser governmental entities. Fifth, is the Ex parte Young exception, 209 U.S. 123 (1908), which allows certain private suits against state officers if the suit seeks only injunctive or declaratory relief to remedy an ongoing violation of law. Sixth, state officers may be sued for money damages in their individual capacity, so long as the relief is sought from the officer personally. Aldin, 527 U.S. at 755-57." Id.

It appears that Ewald's initial response is predicated upon the first exception cited above; the Commonwealth expressly or through the acceptance of Superfund grant funds allegedly consented to the suit she has filed. The Commonwealth, in turn, dismisses Ewald's argument. In its view, the Act embodies no express statement of congressional intent to subject states to suits by private parties, and, consequently, a state may be held accountable in a CERCLA suit initiated only by the federal government, not private citizens.

Virginia's Participation in the Superfund Program

Recognizing that the Eleventh Amendment serves to "avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," the Courts have carefully considered the circumstances which may warrant application of a sovereign immunity exception in the context of federal environmental whistleblower litigation. See, State of Rhode Island Department of Environmental Management v. U.S. 115 F.Supp. 2d 269 (D.R.I., Sept. 29, 2000); State of Ohio Environmental Protection Agency v. U.S. Department of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio, November 14, 2000); State of Connecticut Department of Environmental Protection v. Occupational

Safety and Health Administration, --- F. Supp. 2d ---, No. 3:99CV2291 (D.C. Conn. April 23, 2001). In each action, the court concluded that the doctrine of sovereign immunity bars the whistleblower's suits. Complainant, however, contends that Virginia's participation in the Federal Superfund program is distinguishable in important substantive respects from the Rhode Island, Ohio, Connecticut, and Florida cases, and I have carefully considered her arguments.

The record shows that the Commonwealth had no separate CERCLA authority as a function of State law nor any authorization or funding for CERCLA activities apart from that specified in the federal cooperative agreement.¹² As a program manager responsible for budgeting and staffing, Ewald was aware that the

¹²Complainant's evidence included her affidavit, which the Commonwealth did not dispute, and seven exhibits consisting of an unsigned Application for Federal Assistance to implement CERCLA dated October 12, 1988; a budget summary and itemized breakdown of the program; Federal form 424B which contains "Assurances" generally provided by federal fund applicants in non-construction programs; Federal EPA FORM 5700-33, containing further "Assurances" of compliance with civil rights and labor standards requirements, grantor imposed mandates, and other provisions including Section 13 of the Clean Water Act; A letter dated November 6, 1987, from Virginia Governor Baliles to the EPA Region III Administrator, identifying the state's Department of Waste Management as the lead agency authorized to enter into cooperative agreements and contracts under Section 104(c)(3) of CERCLA; an undated Grant Application, Virginia CORE Program Cooperative Agreement and Grant Work Plan for FY'87-'88; and a memorandum dated December 30, 1988, from Francis Campbell to Cynthia Bailey requesting Bailey's signature on EPA Assistance Agreement Number V-003401-02 to continue the Superfund Core Grant for the period December 15, 1988 through December 14, 1999. While Governor Baliles' letter and the Campbell memo are signed by the authors, no final cooperative agreement, as executed by the parties, was proffered as evidence in this proceeding.

Complainant contends that the Commonwealth refused to provide the close-out grant records she requested. (Compl. Supp. Br at Fn. 1.). The Order dated June 21, 2001, noted that discovery of grant documents was authorized by the April 2, 2001, Discovery Order, but a ruling on Complainant's Motion to Compel would be deferred because the Commonwealth had, in the past, granted her full access to grant documents and had indicated its continued willingness to provide access. The June 21, Order, accepted such access as satisfactory compliance with the requirements of the discovery rules, but deferred ruling on the Motion in anticipation of the parties working out a mutually convenient access arrangement. Complainant did not thereafter communicate any reluctance on the part of the Commonwealth to provide her access to grant documents nor did she renew her Motion to Compel if such cooperation was not forthcoming.

Virginia General Assembly would only authorize the creation of classified positions for Superfund program staff subsequent to the receipt of the federal funds as secured by the executed cooperative agreements. All of the positions eventually authorized for the Virginia Superfund Program were entirely reimbursed by the federal funds. Unlike State involvement with the federal Resource Conservation & Recovery Act (RCRA) programs, the Virginia CERCLA program was entirely federally funded, and had no counterpart in Virginia law. It represented an entirely voluntary election of program responsibility and proceeded only with the oversight and explicit approval of technical capability by EPA.

The cooperative agreements which Ewald negotiated and managed were indistinguishable from private contracts for services pursuant to which work tasks were scheduled and budgets for completing those tasks were agreed upon. As a predicate to federal funding, the Virginia Superfund Program operated in compliance with the standards and specifications enumerated by the U.S. Environmental Protection Agency (EPA). The tasks performed by Virginia Superfund staff were, in fact, concurrently performed by private contractors to the EPA, and Ewald observed that the requirements imposed on Virginia personnel in performing and completing Superfund work were the same as those imposed upon private contractors. While the Virginia staff performed site identification, listing, preliminary assessment, site investigation and HRS scoring for sites within the Commonwealth, private contractors NUS Corporation and Weston conducted this work in Virginia subject to the same requirements, deadlines, and report formats required of the Virginia staff.

Ewald believes that federal funding for the Virginia Superfund Program was curtailed due to budgetary problems which, she alleges, she identified during her employment and which came to fruition several years after her termination. When the federal funding was withdrawn, all Superfund staff positions were eliminated. Information supplied by former Superfund staff indicates that no Virginia employees currently perform CERCLA activities. All CERCLA work in Virginia is performed by EPA or its contractors.

While employed by the Commonwealth, Ewald contends she was never advised that Virginia considered itself in any way exempt from any of the federally mandated obligations that derived from contractual arrangements with EPA, and, rather, was specifically instructed that all Virginia personnel were subject to OSHA health and safety and Drug Free Workplace requirements, the federal Wage and

Hour law, and Equal Opportunity Act protections. Posters discussing employee rights pursuant to these laws were prominently displayed around the waste management and other state offices. As a result, Ewald understood that as an employee of the Commonwealth she enjoyed the same rights and protections that federal law afforded her counterparts with the EPA and private companies contracted to the EPA.

In addition, Ewald attested to the fact that the Commonwealth owned and operated sites that were the subject of investigation pursuant to the federal CERCLA authority. She alleges that she was, in fact, terminated, in part, because her staff discovered that the Commonwealth's Cheatham Annex was an uncontrolled waste site and she insisted that it be duly reported as required by CERCLA. EPA subsequently investigated her allegations regarding Cheatham Annex and, Ewald observes, eventually fined the Commonwealth for violations of CERCLA related to that site. Accordingly, Ewald charges that her termination not only violated Virginia's policies on separation from employment, but constituted retaliation for her criticism of the policies and procedures of the DWM which were in accord neither with CERCLA nor the provisions of the applicable cooperative agreement.

Emphasizing that Virginia's CERCLA participation was entirely voluntary, Ewald argues that the Commonwealth willingly subjected itself to federally mandated obligations and waived its sovereign immunity when it entered into contractual arrangements with the federal Environmental Protection Agency to implement the Commonwealth's superfund program and accepted federal funds. While the Commonwealth does not refute Ewald's fact allegations, it does dispute her conclusions that CERCLA conditions the grant of federal funds on a waiver of its sovereign immunity, and, in any event, denies that it waived sovereign immunity, contending that only its General Assembly can authorize such a waiver, (*See, Deal & Assoc., Inc. v. Commonwealth*, 224 Va. 618, 299 S.E. 2d 346 (1983)), and it has not done so in this instance.

Congressional Intent

I.

Section 9610 (a) of the CERCLA provides, in part, as follows:

No person shall fire or in any other way
discriminate against, or cause to be fired or discriminated
against, any employee...by reason of the fact that such

employee... has provided information to a state or to the federal government, filed, instituted, ...or testified...in any proceeding resulting from the administration or enforcement of the provisions of this act.

Significantly, a “person” within the meaning of 42 U.S.C. § 9601(21) includes, *inter alia*, the “... United States Government, State, municipality, commission, political subdivision of a state, or any interstate body.” Ewald thus reasons that the inclusion of the States within the definition of a “person” under the act manifests the congressional intent to subject the States to the prohibitions of Section 9610 (a) and afford injured employees the right to proceed against such persons, including States, as provided in Sections 9610(b) and (c) of the Act. She contends further that Congress conditioned its Superfund grants on the agreement by each state, either expressly or by accepting federal funds, to waive its sovereign immunity. In response, the Commonwealth concedes that it is a “person” within the meaning of Section 9601(21) of CERCLA, and that it is precluded from firing or otherwise discriminating against an employee for engaging in whistleblower activities. It further concedes that the Department of Labor has jurisdiction “to adjudicate complaints against any ‘person,’” including the Commonwealth of Virginia, (Va. Motion to Dism. at 5), but it denies that private parties enjoy similar authority. As the Commonwealth understands CERCLA, Congress never sought a waiver as a condition to funding Virginia’s Superfund program and the Commonwealth never acceded to a waiver.

II.

When “Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’ Pennhurst State School and Hospital v. Halderman, 101 S.Ct. 1531(1981).” South Dakota v. Dole, 107 S. Ct. 2793, at 2796 (1987). As Complainant interprets it, the inclusion of states within the definition of a “person” under the Act is sufficiently unequivocal to accord the states adequate notice of the consequences of accepting federal funds. The authorities suggest that the definitions applicable to the Act may be instructive in ascertaining congressional intent to condition a grant of federal funds on a waiver of sovereign immunity. In Kimmel v. Florida Board of Regents, 120 S. Ct. 631 (2000), for example, congressional intent to abrogate the states’ sovereign immunity was “unmistakably clear” in the context of an Age Discrimination in Employment

Act enforcement action against a “public agency” defined to include “the government of a state.” CERCLA similarly defines “persons” subject to whistleblower actions to include “States.” Yet, CERCLA contains other provisions which suggest that an analysis which focuses upon the Act’s definitions may be a bit too narrow.

Notwithstanding the inclusion of the federal and state governments within the definition of a “person,” CERCLA contains a specific waiver of sovereign immunity by the federal government (42 U.S.C. 9620(a)(1)) and a specific abrogation of state sovereign immunity (42 U.S.C. 9601(20)(D)) when States, acting as operators of hazardous waste facilities or arranging for the treatment or disposal of hazardous waste, cause or contribute to the release of a hazardous substance. The Commonwealth contends that these provisions would not be necessary if the inclusion of the governmental entities in the definition of “person” unmistakably waived federal sovereign immunity or sought to abrogate or condition a grant of federal funds on a state’s waiver of sovereign immunity. The contention is not without merit.

Because CERCLA, Section 9601(20)(D) addresses specific situations in which Congress intended and expressly sought, albeit unsuccessfully,¹³ to subject the states to private suits for causing or contributing to the release of hazardous materials, the notion that Congress intended to require states to waive sovereign immunity in all other circumstances by virtue of the definition of “person” in Section 9601(21) is unsustainable. If Section 9601(21) subjected the States to private suits for all CERCLA infractions, Section 9601(20)(D) would be superfluous. Yet, if the relationship between Sections 9601(21) and 9601(20)(D) seems ambiguous, consideration of the statute viewed in its entirety resolves their interaction.

Assuming Superfund grants were conditioned on the States’ waiver of sovereign immunity, the grant conditions appear limited by CERCLA to specific circumstances in which Congress expressly sought to subject the states to private

¹³ A state’s liability under CERCLA was upheld when it functioned as an owner/operator in Pennsylvania v. Union Gas Co., 491 U.S. 3 (1989). Union Gas was, of course, overruled by the Court in Seminole Tribes of Florida v. Florida, 517 U.S. 44, 72-73 (1996). Although overturned, the limited abrogation of sovereign immunity Congress attempted to impose in the owner/operator situation set forth in CERCLA is relevant in assessing Complainant’s contention that Congress sought a broader consensual waiver from the states with respect to the whistleblower provisions of CERCLA.

suits when they mishandled hazardous materials. Although the definition of a “person” in Section 9601(21) includes the States and Section 9659(a)(1) authorizes any “person” to commence a civil action on his own behalf against any “person” alleged to be in violation of CERCLA, Section 9659(a)(1) also includes a significant caveat. It incorporates a crucial parenthetical which allows a civil action against, “...any person (including the United States and any other governmental instrumentality or agency, **to the extent permitted by the eleventh amendment to the Constitution**).” (Emphasis added). At the time, of course, Congress

considered its commerce power sufficient to abrogate sovereign immunity, and it attempted to do so in Section 9601(20)(D).

Thus, rather than condition the grant of funds on a waiver of sovereign immunity, it appears Congress enacted Section 9659(a)(1) in 1986 with the intent of allowing private citizens who lived near hazardous waste sites and others to commence suits to ensure cleanup actions of the type specified in Section 9601(20)(D). (*See*, H.R. Rep. 99-253(III),*34; (V),*83, 99th Cong., 1st Sess.(1985)). Beyond those specific circumstances, Section 9659(a)(1) otherwise seems to clarify, by the parenthetical reservation, a congressional concern that the definition of “person” not be construed as an indication of congressional intent to seek waivers from the states for all CERCLA infractions.¹⁴ Rather, Section 9659(a)(1) addressed the specific abrogation Congress attempted to impose for Section 9601(20)(D) violations and left the Eleventh Amendment immunity intact in all other cases.

Beyond the very limited abrogation attempted in Section 9601(20)(D), CERCLA otherwise contains no express indication of any intent to condition the grant of federal funds on a waiver of sovereign immunity. In South Dakota v. Dole, for example, the Court upheld an express, unambiguous condition which withheld 5% of a state’s federal highway grant for declining to raise the state’s drinking age to 21. CERCLA embodies no similar condition. Nothing in CERCLA indicates that Congress intended to condition all or part of a state’s CERCLA grant on an

¹⁴In Douglas v. California Dept. of Youth Auth., _ F.3d _ (9th Cir., November 14, 2001), a waiver of immunity was implied as a consequence of a State’s acceptance of federal funds under the Rehabilitation Act. Unlike the CERCLA provision at issue here, however, the Rehabilitation Act provides that the “States shall not be immune under the Eleventh Amendment.” The Court concluded that this language constituted a “clear waiver.” *Supra* at fn. 3, and accompanying text.

agreement by the state to waive its sovereign immunity. Thus, the District Court in Florida v U.S., with the CERCLA provisions before it, observed that; “The whistleblower provisions adopted by Congress evidence no clear intention by Congress to make states susceptible to whistleblower claims by private individuals.” *Florida Supra* at 9.¹⁵ Under such circumstances, it would be difficult to conclude that the inclusion of States within the definition of a “person,” alone, manifests the requisite unmistakable congressional intent to condition the federal grant on a state’s waiver of sovereign immunity for all CERCLA violations generally or whistleblower infractions in particular.

The Federal Grants Were Not Conditioned

The absence of the requisite legislative expression of intent in CERCLA to condition the grant of federal funds on the waiver of sovereign immunity is mirrored in the administrative implementation of the statute. College Savings Bank, *supra*. No Superfund or other grant document in this record incorporates a specific waiver of sovereign immunity with respect to whistleblower infractions under CERCLA or the other environmental statutes.¹⁶ To the contrary, the grant documents in evidence here (*See*, Complainant’s Ex. 3, 4) are virtually identical to the SWD assurances reviewed by the Court in Rhode Island v. U.S., *supra*:

[Applicant] will comply with all federal statutes relating to nondiscrimination. These include but are not limited to ...any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and ... the requirements of any other nondiscrimination statute(s) which may apply to the application...[and further will] comply with all

¹⁵In the Florida case, the allegations involved the CAA, the SDW, and CERCLA. In the Connecticut case, the court reviewed the CAA and the SWD. In the Ohio case, the Court considered CERCLA, the SDW, the TSCA, the CAA, the FWPPA, the SWD, and the ERA. The Rhode Island case involved the SWD.

¹⁶ In Connecticut v. OSHA, *supra*, an amicus brief filed by Public Employees for Environmental Responsibility (PEER) asserted that the state waived its immunity by virtue of its receipt of federal funds; however, the court declined to reach the issue “because the OSHA defendant” did not claim “that there had been a waiver of sovereign immunity by the state....” Connecticut, *supra*, at fn. 3.

applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

Thus, the state agreed to abide by federal laws prohibiting various forms of discrimination as a condition to receiving federal funds and participating in various programs, and the *amicus* in the Rhode Island case, Public Employees for Environmental Responsibility (PEER), argued that the state agreed to those conditions to secure federal funds, thereby waiving its immunity with respect to private whistleblower suits under the SWD. 42 USC §§ 6991-6992k. The Court observed, however, that the cited provision “... falls far short of the express and unequivocal language required to establish a waiver. On its face, it is simply an agreement to abide by federal laws prohibiting discrimination. It does not even mention, let alone, waive, the State’s immunity from suit by private parties.” Rhode Island, *supra* at 6. The Court further rebuffed the argument that if the provision were construed as anything but a waiver, the State’s agreement would be meaningless. The federal government, the Court observed, could force the state’s compliance.

Constructive Waiver Is Not Triggered by
Commonwealth’s Participation in Superfund Program

Moreover, it has not been established on this record that the Virginia General Assembly created the Virginia Superfund Program with delegated authority to staff positions sufficient to waive sovereign immunity. No statutory enactment or other legal basis conferring the delegation of authority Ewald describes has been cited in this proceeding. Indeed, Complainant previously occupied the position of Director of Virginia’s Superfund Program, an office she believes was created by the General Assembly with sufficient authority to negotiate, prepare, submit, and implement Superfund cooperative agreements with the federal EPA. Yet, this record contains no Superfund document she executed and no citation to the delegation of authority allegedly conferred upon her office or any other Commonwealth official. Although afforded ample opportunity, Complainant has not demonstrated that the Commonwealth has “passed any law evincing an intent to be sued by a private party,” or “acquiesced to being sued” in this matter. *See, South Carolina State Ports*, *supra* at 11-12.

A Waiver Is Not Triggered by
Past Participation in Whistleblower Proceedings

Complainant observes that the Commonwealth has over the years voluntarily participated in various labor or environmental whistleblower proceedings, and has, as a result of past settlements or compromises in those cases, waived its immunity in cases of this type. The Supreme Court has ruled, however, that a state's sovereign immunity is "a personal privilege which it may waive at any time." Clark v. Barnard, 108 U.S.436, 447 (1883). Episodic waivers in individual cases in the past are, therefore, not pertinent in this proceeding.

Complainant further emphasizes, however, that the Commonwealth participated in this matter for many years without asserting its sovereign immunity, and has thus waived its sovereign immunity in this particular proceeding. Yet, College Savings Bank makes clear that a waiver can not be implied either because the Commonwealth previously participated in this matter or waived its immunity in other similar cases; a state may "absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit." College Savings Bank, *supra* at 2226; (See also, Ohio v. U.S., *supra* at 17-18). As the Court in Ohio v. U.S. Dept. of Labor, observed: "While this court does not condone a tardy assertion of sovereign immunity by the State of Ohio, the defense of sovereign immunity under the Eleventh Amendment may be raised at any time in the proceedings." Ohio, *supra* at Slip. Op., pg. 18.

Dismissal of Commonwealth

In conclusion, the absence of an unequivocal expression of congressional intent to condition the grant of CERCLA funds on a sovereign immunity waiver by the states, (See, College Savings Bank, *supra* at 2231); the absence of a sovereign immunity waiver in grant documents; and the failure of this record to reflect any enactment by Virginia's General Assembly or other delegation of authority within the Commonwealth to expressly waive sovereign immunity, (Edelman v. Jordan, 415 U.S. 651 (1974); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, fn.1(1985) ("the mere receipt of federal funds cannot establish that a state has consented to a private suit in federal court"); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944); See, Aldin v. Maine, 527 U.S. 706(1999), (waiver exists only when a state expressly consents to suit)); require dismissal of the Commonwealth from this proceeding.

Motion to Amend to Add Parties

In her reply to the Commonwealth's Motion to Dismiss, Ewald moved to amend her complaint to add Dr. K.C. Das, her former supervisor, and former DWM Director Cynthia Bailey, as party respondents in their individual capacities. With respect to these individuals, Ewald alleges that "[f]rom the start of this litigation it has been clear that Dr. Das and Bailey were the primary perpetrators of the retaliatory campaign against" her. In her "Further Arguments in Opposition to Respondent's Motion to Dismiss," filed August 8, 2001, she also seeks to add the federal EPA as a party. Finally, Complainant moves to add the current chief of the Commonwealth's environmental agency "in his/her individual capacity" so that she may obtain injunctive relief such as expunging her personnel records or prohibiting the releases of her employment records. Although the Commonwealth invokes its sovereign immunity on behalf of its employees, (*See*, Hearing, March 20, 2001, Tr. 47-48), Complainant emphasizes that Ex parte Young, 209 U.S. 123 (1908), is an exception which allows claims for declaratory and injunctive relief against state officials, named and served in their individual capacities, in order to preclude prospective, continuing violations of federal law.

Availability of a State Forum to Address Complainant's Grievances

Initially, the Commonwealth, relying on Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261 (1997), contends that Ex parte Young is not applicable because Ewald had an adequate remedy in state law had she invoked the state grievance procedures. (*See*, Hearing, March 20, 2001, Tr. 40, 42, and 48). The Commonwealth's reliance on Coeur d' Alene is misplaced.

Although the principal opinion in Coeur d' Alene cited the availability of a state forum to vindicate federal interests as a factor to consider when applying Ex parte Young, a majority of the Court was unable to accept that formulation. (*See*, Concurring opinion by Justice O'Connor, joined by Justices Scalia and Thomas, (adequacy of state remedies "is not a sufficient basis for the principal opinion's broad conclusion,"), and Dissenting opinion of Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, (The notion that the availability of a state remedy governs the application of Ex parte Young "...is mistaken in theory, and contrary

to practice.”)). I conclude that availability of a state grievance procedure is insufficient to justify denial of Complainant’s Motion to Amend.

Amendment to Add Former Supervisors and the EPA

The Commonwealth further contends that Ewald’s motion to add Dr. Das and Bailey as individual respondents is barred by the statute of limitations. While it recognizes that an amendment adding a party can relate back to the date of the original complaint, it asserts that the statute is not tolled in this instance because, contrary to Federal Rule 15(c)(3), Ewald made no mistake in identity when she brought this action, not against the EPA or Dr. Das and Bailey, but the Commonwealth of Virginia, and Ewald does not contend otherwise. She, in fact, corroborates the Commonwealth’s contention that her amendment is not predicated upon any mistake in the identity of those who allegedly targeted her for retaliation; “from the start of this litigation it has been clear that Dr. Das and Ms. Bailey were the primary perpetrators of the retaliatory campaign against Ms. Ewald.” (Ewald, Motion at 5). The applicable rule in this proceeding, however, is not Federal Rule 15(c), as invoked by the Commonwealth, but 29 C.F.R. § 18.5(e), which provides that a complaint may be amended after the answer “if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint.”

The Secretary’s decision in Wilson v. Bolin Associates, Inc., 91 STA 4 (Sec. Dec. 30, 1991), guides the application of Rule 18.5(e). While Complainant correctly observes that Bolin imposes liability upon individuals for their retaliatory conduct and authorizes amendments to add them as party respondents, the circumstances in Bolin are otherwise distinguishable from those involved here. Although Bolin was the sole shareholder and chief executive officer of the defunct corporate Respondent, the Secretary determined that it was unnecessary to pierce the corporate veil because Bolin was the person who discharged the Complainant. Nevertheless, in affirming a decision which added Bolin, individually, the Secretary determined that the original complaint not only challenged “Bolin’s individual employment decision,” but Mr. Bolin received notice from the outset of the case and “participated in the investigation and all proceedings....” Bolin thus weighs due process considerations under Rule 18.5(e) when an amendment involves adding a party.

Like Bolin, Dr. Das and Bailey, as Ewald’s supervisors, allegedly perpetrated acts of retaliation which are the subject of a complaint, but, unlike

Bolin who received actual notice of the case and participated in the investigation and “all” proceedings, Dr. Das’ and Bailey’s participation in this matter was considerably more remote in time and substance. Ewald deposed both individuals in 1989, but it has not been shown that either received any further notice of the various motions, responses, orders, appeals or hearings since then or otherwise participated in any other manner at any stage of these proceedings.

Similarly, EPA’s alleged “role in Ms. Ewald’s demise as a DWM employee” is raised for the first time in her Additional Argument and Analysis filed August 7, 2001. While Bolin “was intimately involved in his case from start to finish,” Bailey and Dr. Das were last involved here more than a decade ago, and EPA’s involvement, if any, occurred at least that long ago assuming, as alleged, that it had any role in Ewald’s demise as an employee of the DWM. Consequently, due process considerations discussed in Bolin weigh against adding Dr. Das, Bailey, or the EPA under the circumstances here evident.

For all of the foregoing reasons, I am unable to conclude that the amendment to add the EPA as a party, or Dr. Das and Bailey, as party respondents in their individual capacities is reasonably within the scope of the original complaint within the meaning of 29 C.F.R. § 18.5(e) as interpreted by Bolin.

Amendment to Add Current Head of
Commonwealth’s Environmental Agency

Nor has Complainant established a basis for adding “in her/his individual capacity” the person who currently occupies the top position of the Commonwealth’s environmental agency. It does not appear that this individual ever participated in any way in a retaliatory or discriminatory action against Complainant.¹⁷ Unlike Dr. Das, Bailey, and the EPA, it appears this individual is not accused of “unauthorized conduct.” (See, Larson v. Domestic and Foreign

¹⁷In Ex Parte Young, 28 S.Ct. 441 (1908), the Court concluded that a state attorney general was not entitled to invoke sovereign immunity and could be sued in his individual capacity when he seeks to enforce an unconstitutional state statute. The Court reasoned that: ‘If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.’ Ex Parte Young, at 454.

Commerce Corp., 387 U.S. 682 (1949)). Rather, Complainant seeks to require that this individual in his or her individual capacity take prospective,¹⁸ ministerial action with respect to state personnel records. Yet, it appears that official action would be needed to accomplish the result she hopes to achieve. See, In re Ayers, 123 U.S. 443 (1887). In his or her individual capacity, the person she seeks to add as a party likely would not, and certainly should not, have access to Ewald's personnel records, let alone authority to take any action regarding her official records. Consequently, assuming injunctive relief applicable to state personnel records were an appropriate remedy, implementation would necessarily involve only state officials acting in their official, not individual, capacities.

Beyond that, mere succession to an office in public service does not expose a blameless official to individual liability exposure for the actions of his or her predecessors. Accordingly, the individual who currently heads the Commonwealth's environmental agency may not be named in this proceeding as a party respondent in his or her individual capacity.

Participation by OSHA

Finally, Complainant, citing the procedure adopted by the District Court in Ohio v. U.S. Dept of Labor, *supra*, seeks permission to petition the Department of Labor to prosecute her case in an enforcement action. (Compl., Further Arguments at 3-4). While the District Court in Connecticut v. OSHA, *supra*, at 24-26, dismissed the notion that the Department was or could be a party to these types of proceedings, the regulations promulgated and published at 29 C.F.R. § 24.6(f)(1) specifically provide that: "At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as *amicus curiae* at any time in the proceedings. This right to participate shall include, but is not limited to, the right to petition for review of a recommended decision..." Although he has not done so to date, the rules governing these proceedings permit the Assistant Secretary, in his discretion, to participate as a party in this proceeding at any time; and Complainant always has been free to invite the Assistant Secretary's involvement in the matter.

¹⁸While the Eleventh Amendment may not, in some instances, be a bar where prospective relief is sought, (See, Ex parte Young, *supra*; Edelman v. Jordan, 415 U.S.651 (1974)), the relief sought in Coeur d' Alene Tribe was denied even though it was wholly prospective in nature.

Nor has that option expired. The rules permit the Assistant Secretary, *sua sponte* or upon request, to enter a matter at his discretion for the first time at the appellate stage where the ARB may exercise its jurisdiction to review a case *de novo* upon the petition of a party or the Assistant Secretary. Consequently, should the Assistant Secretary decide to participate hereinafter, the ARB, with a timely appeal before it, would be free to consider the legal issues *de novo* and determine the effect, if any, of such participation by OSHA on the Commonwealth's sovereign immunity.¹⁹

ORDER

IT IS ORDERED That the Motion to Dismiss filed by the Commonwealth of Virginia be, and it hereby is, Granted;

IT IS FURTHER ORDERED that Complainant's Motion to Amend be, and it hereby is, Denied.

Stuart A. Levin

A

Administrative Law Judge

¹⁹In Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000) (footnote omitted) the Board ruled that:

...in reviewing the ALJ's initial decision, the Board acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C. §§557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.*, No. 86-ERA-36, Sec'y D&O (April 7, 1992). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*....

In assessing its jurisdiction, the Board has determined that it retains complete freedom of decision, as though it had heard the evidence itself. *But see, Dantran v. U.S.*, No. 00-1656, —F.3d — (1st Cir. April 13, 2001).